October 11, 2011

VIA ELECTRONIC SUBMISSION:  http://www.regulations.gov

Debra A. Carr  
Director  
Division of Policy, Planning & Program Development  
Office of Federal Contract Compliance Programs  
Room C-3325  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

Re:  Advanced Notice of Proposed Rulemaking Related to Non-Discrimination in Compensation; Compensation Data Collection Tool; RIN 1250-AA03.

Dear Ms. Carr:

The Society for Human Resource Management (SHRM) and the College and University Professional Association for Human Resources (CUPA-HR) appreciate this opportunity to provide comments on the possible development and implementation of a compensation data collection tool by the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP), as announced in the Federal Register on August 10, 2011. These comments were prepared on behalf of SHRM and CUPA-HR by Jackson Lewis L.L.P.¹

STATEMENT OF INTEREST

SHRM is the world’s largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and

¹ For more than 50 years, Jackson Lewis has placed a high premium on preventive strategies and positive solutions in the practice of workplace law. With over 650 employment law practitioners in 46 offices nationwide, the firm partners with employers to devise policies and procedures promoting constructive employee relations and limiting disputes. Jackson Lewis has a robust affirmative action compliance practice. The Firm prepares more than 1700 affirmative action plans every year and regularly represents Federal contractors during OFCCP compliance audits.
India.

CUPA-HR serves as the voice of human resources in higher education, representing more than 11,000 HR professionals at over 1,700 colleges and universities across the country, including 90 percent of all U.S. doctoral institutions, 70 percent of all master’s institutions, more than half of all bachelor’s institutions and nearly 500 two-year and specialized institutions. Higher education employs 3.3 million workers nationwide, with colleges and universities in all 50 states.

Many of SHRM’s and CUPA-HR’s members are Federal contractors subject to the Executive Order 11246, which, among other things, prohibits discrimination in compensation on the basis of race, color, national origin, religion, and sex.

COMMENTS ON THE ADVANCED NOTICE OF PROPOSED RULEMAKING

SHRM and CUPA-HR strongly support nondiscrimination in compensation and believe that compensation decisions should be based on an individual’s qualifications and ability to perform a job, not on characteristics that have no bearing on job performance. As organizations, we regularly seek to promote effective practices for advancing equal employment opportunity for all, including in the area of compensation discrimination. SHRM also provides training to its members on compensation discrimination and its members regularly engage in outreach efforts to civil rights and women’s organizations, both as part of their current affirmative action obligations and as a sound business practice. CUPA-HR also has created significant online resources promoting equal opportunity, including articles and links to help HR professionals advance fair compensation practices. CUPA-HR annual, regional and chapter conferences also frequently include sessions related to compensation discrimination and affirmative action requirements.

I. GENERAL RESPONSE TO ADVANCE NOTICE

In its Advance Notice of Proposed Rulemaking ("ANPRM"), the OFCCP states that it is considering the development of a "compensation data collection tool" to "generate insight into potential problems of compensation discrimination at the establishment level that warrant further review or evaluation by OFCCP or contractor self-audit . . . as well as to identify and analyze industry trends . . ." As a preliminary matter, we want to share our significant concerns about whether there is a need to collect further compensation data from the Federal contractor workforce, the apparent lack of coordination between OFCCP’s efforts and those of its sister agency, the United States Equal Employment Opportunity Commission ("EEOC"), the lack of utility in gathering compensation data using a generic "one size fits all" approach, and the criticality of protecting Federal contractors’ highly-sensitive and proprietary compensation data from inappropriate public disclosure.

A. There Is Not A Demonstrated Need For Another Compensation Data Collection Tool.

As an initial matter, and as outlined in the September 28, 2011 letter jointly submitted to the OFCCP by the Equal Employment Advisory Council, the U.S. Chamber of Commerce, National Association of Manufacturers, Center for Corporate Equality, HR Policy Association, SHRM,
CUPA-HR, Associated Builders and Contractors, and The Associated General Contractors of America, ("the Joint Letter"), we are concerned that the OFCCP is moving forward with the development of yet another compensation data collection tool, without fully researching whether such a tool is necessary in light of the compensation data that the agency already collects from Federal contractors as part of its current enforcement practices. We believe that such steps are required – both under President Obama’s recent directive that there should be “no more regulation than the health, safety and security of the American people require” and as part of general good government practices aimed at promoting a flourishing economic climate where all have an opportunity to succeed.

Since 2000, the OFCCP has collected detailed compensation data from Federal contractors as part of the agency’s routine compliance evaluation process, resulting in the collection of millions of compensation data points from more than 40,000 Federal contractor establishments. Yet there is no mention in the ANPRM as to whether the OFCCP has examined whether its current practices might be the least burdensome means to achieve the agency’s stated goals. Furthermore, the agency’s own enforcement history does not support the agency’s claim that the wage gap “continues to plague” the U.S. workforce. Since 2006, and despite a clear emphasis on compensation discrimination issues, less than one-third of one percent of the agency’s compliance evaluations have resulted in a finding of compensation discrimination.

We are by no means suggesting that compensation discrimination should not be an enforcement priority for the agency. However, as the agency itself concluded in its January 12, 2009 report titled “An Analysis of Reasons for the Disparity in Wages Between Men and Women”, we are respectfully suggesting that further research be conducted in this area before a new data collection tool is implemented. Unlike some of the agency’s past work which focused on validating a new tool that had already been created, such research should preliminarily focus on steps the agency could take to better utilize the compensation data it already collects from Federal contractors.

B. Coordination with Other Enforcement Agencies Is Critical To Minimizing The Burden On Federal Contractors.

This Administration has placed a priority on coordinated enforcement efforts among and across agencies with common purposes and goals. We applaud that effort and strongly encourage the OFCCP to engage in such inter-agency coordination when developing any new compensation data collection tool. As the OFCCP well knows, creating shared tools that provide each enforcement agency with the data needed to carry out its mission greatly reduces the burden of complying with data collection requirements for the regulated community.

The positive impact such coordinated efforts have on the regulated community simply cannot be understated. Imagine, for example, the unnecessary burden that would be imposed on Federal contractors if they had to file separate reports with the OFCCP and the EEOC detailing the gender, race and ethnicity of their workforce each year. Multiple reports would not serve either agency’s needs any better but would double the burden on Federal contractors.
A report issued by President Obama’s National Equal Pay Enforcement Task Force only serves to underscore the importance of such collaboration in the area of data collection. The report clearly states that the OFCCP will work collaboratively with the EEOC “when evaluating data collection needs, capabilities and tools.” Since the EEOC recently commissioned the National Academy of Sciences to study data collection efforts, we urge the OFCCP to delay its evaluation of any new data collection tools until after that study is completed.

C. Collecting Compensation Data Using A Generic Set Of Criteria Will Not Assist OFCCP In Eradicating Compensation Discrimination.

Our members also have expressed concern about the utility of comparing employers’ compensation data using a generic, “one size fits all” tool. In the private sector, there are as many different ways to set and determine compensation as there are organizations in this country. Given this, using a single data collection tool to collect this varied data simply does not make sense and will not aid the OFCCP in its stated goals.

Unlike the Federal government, which relies on a rigid pay scale to determine base wages and step increases, private employers determine base salary using a variety of different practices, review and award wage increases on different timetables and using different factors, and make other adjustments to their compensation systems differently. Creating a single, generic data collection tool to be used by all Federal contractors in a way that provides meaningful compensation data to the Federal government is, in our view, not practicable. As the OFCCP knows from its own compliance evaluations, a proper, and legally defensible, compensation analysis only can be conducted by devising an appropriate evaluation model based on an understanding of an individual organization’s compensation system, and the unique factors that play a role in establishing compensation at that organization. A generic compensation data collection tool that collects generic information rarely will yield reliable results for determining if compensation discrimination exists or if further analysis is truly necessary.

D. Any Compensation Data Tool Must Protect Federal Contractor’s Highly-Sensitive And Proprietary Information From Inappropriate Disclosure.

Perhaps more than anything else, our members have expressed substantial concerns about the confidentiality of the compensation data that the OFCCP proposes to collect. The ANPRM suggests that the agency apparently intends to use any new compensation data tool to gather very specific compensation information regarding individual employees at specific establishments. The OFCCP also has publicly suggested that it will publish the compensation data of Federal contractors in an aggregated format, perhaps in a web-based, publicly available, database.

Compensation data of the nature OFCCP apparently intends to collect is especially sensitive and confidential, as it necessarily provides insight into an organization’s competitive strategies, internal costs, and other valuable business details. Release of an organization’s compensation information — through FOIA, by intentional misappropriation, or through a web-based database of aggregate compensation information — poses potentially devastating consequences to business organizations. For this reason, we urge the OFCCP to not move forward with the implementation
of any compensation data collection tool until appropriate data security safeguards are developed, tested, and perfected to ensure protection of employers’ highly sensitive pay data.

II. COMMENTS ON OFCCP’S SPECIFIC REQUESTS FOR INFORMATION

For the reasons provided above, and those outlined in the September 28, 2011 Joint Letter, we recommend that the OFCCP undertake further research before proposing any new compensation data collection tool. To the extent that the OFCCP decides to move forward with developing a new data compensation tool, we provide the following comments on the specific questions raised in the agency’s ANPRM:

(1) What data or information should be collected for OFCCP to assess whether further investigation into the contractor’s compensation decisions and policies is necessary? In developing your response, please consider whether any of the following categories of data, reported by gender and race/ethnic groups, singly or in combination, would effectively identify potential compensation discrimination:

(a) Average starting or initial total compensation (including paid leave, health and retirement benefits, etc.); (b) Average pay raises; (c) Average bonuses; (d) Minimum and maximum salary; (e) Standard deviation or variance of salary; (f) The number of workers in each gender and race/ethnicity category; (g) Average tenure; (h) Average compensation data by job series (e.g., all engineers within a particular department or all secretaries throughout the establishment); and/or (i) Any other categories of data?

Response:

Evaluating an organization’s compensation data, even if for the purpose of determining whether further investigation is required, necessarily requires an individualized approach tailored to the particular manner in which that organization makes compensation decisions. Indeed, even different jobs within the same organization may be compensated differently and pursuant to different policies and practices. For these reasons, our members strongly recommend that OFCCP not create another generic, “one size fits all” data collection tool.

Before addressing each of the categories of data proposed in the ANPRM, we also want to highlight our belief that providing aggregated compensation data of any kind is simply not useful to the OFCCP’s stated purposes. Indeed, the OFCCP apparently has concluded this itself, as evidenced by the agency’s recent request to change the compensation information Federal contractors are required to provide in response to a Scheduling Letter. This also was one of the primary reasons the agency abandoned the EO Survey. Accordingly, we urge the OFCCP not to undertake an effort to collect aggregated data from Federal contractors that will again go unused once it is collected.

In our experience, average starting salary information is not particularly relevant to identifying whether a prohibited basis played a role in compensation decisions, unless such data is accompanied by detailed background information, such as prior salary, educational background,
and number of years and type of prior experience. Similarly, data regarding average pay raises and average bonuses is not useful without data regarding employees' past performance or other factors that impact such salary increases. Data regarding the "value" of fringe benefits, such as paid leave, and health and retirement benefits, should not be collected in any compensation data collection tool because employees often are able to choose whether to participate in such programs, making any such information highly irrelevant to examining whether compensation disparities were caused by discrimination.

The OFCCP also must be mindful that Federal contractors often employ individuals at geographically diverse locations, and that cost of living, market rates, and other geographic factors often affect compensation. In addition, department or area of specialty is an essential ingredient of compensation at many educational institutions and other organizations. Performance of both the individual and the overall organization is often another important factor in explaining compensation decisions. Workplace flexibility programs, such as the availability of telecommuting programs, or part-time or flexible work schedules, also may influence compensation, and a particular employee's decision to accept a particular salary. Given the many factors that can influence compensation, it is likely not feasible or practical for the OFCCP to create a compensation data collection tool that is able to account for all of the significant factors that may affect compensation across the broad spectrum of Federal contractors.

Instead, we believe that base salary or wage rate and time in position are probably the most meaningful data points to collect for conducting a preliminary analysis of Federal contractors' compensation practices. We recognize that a compensation data collection tool that collected this information likely would result in a high number of false positives, simply because of the fact that there are a multitude of other factors that impact compensation. However, we believe that a data collection tool limited to these two factors appropriately balances the burden on the regulated community with any benefit of providing compensation data to the Federal government using a generic compensation data tool. Quite simply, requiring that Federal contractors provide compensation data other than base salary or wage rate and time in position would require extensive research and data entry for most Federal contractors. The majority of Federal contractors do not maintain all of the types of data listed in the ANPRM in a central system or database. The administrative burdens associated with compiling such detailed compensation data for each establishment on an annual basis must be considered by the agency.

(2) By what set of job categories should the data be referred to in question (1) be collected? Some job group options include EEO-1 job categories, OFCCP's AAP job groups, 2 or 3-digit Standard Occupational Classification Codes, O*Net Occupational Classification Codes, salary bands, salary bands within EEO-1 categories, individual job titles or individual job titles within EEO-1 job categories. Are there other options? What are the benefits and drawbacks of the various options?

Response:

Generally speaking, we believe that it is most appropriate to analyze compensation data by individual job title. Other groupings, such as EEO-1 job categories and AAP job groups, are too
broad for meaningful analysis of the reasons for particular compensation disparities. However, providing such granular data to the OFCCP increases concerns about whether the confidentiality of such data will be adequately protected. In many organizations, there will only be two or three individuals who perform the same job, making it much more likely that publishing any compensation data collected will have a negative impact on an organization’s overall competitiveness.

(3) What elements of compensation should be collected? In developing your response consider the following elements: (a) Total W-2 earnings; (b) Base salary; (c) Holiday pay; (d) Hourly wage; (e) Shift differential; (f) Commissions; (g) Stock options; and/or (h) Any other elements of compensation (e.g., paid leave, health or retirement benefits)?

Response:

Please see our response to question no. 1, set forth above.

(4) Is there a set of questions that would capture information that would be helpful in understanding a contractor’s compensation system, such as policies relating to promotion decisions, bonuses, shift pay, setting of initial pay, etc.?

Response:

We believe that collecting this type of information at a preliminary screening stage is not likely to capture sufficient information to adequately explain the relevant variables influencing compensation at any given organization. Unlike the Federal government, which maintains a rigid compensation pay scale, many organizations provide more flexibility within the pay system that managers are to follow when determining compensation, promotions and bonuses. Therefore, in lieu of a pre-determined set of questions, we recommend that the agency provide Federal contractors with discretion as to what information, if any, is submitted to explain its compensation system.

(5) OFCCP may use the data collected through the tool to conduct industry-wide compensation trend analyses.

(a) What type of compensation trend analyses would be appropriate to conduct on an industry-wide basis?

(b) For each type of analysis identified in subpart (a) above, identify the (i) Categories of data that should be collected in order to compare compensation data across contractors in a particular industry and (ii) job groupings that should be used.
Response:

We respectfully urge the OFCCP to reconsider using any compensation data collected from Federal contractors to conduct industry-wide compensation trend analyses. As an initial matter, we question whether the agency has the authority, or adequate resources, to conduct such trend analyses on an industry-wide basis. Moreover, in order to conduct meaningful trend analyses, we believe that the agency would have to collect far more detailed information than we believe is necessary or desirable for enforcement purposes, particularly at a preliminary screening step. The agency’s interest in conducting industry-wide trend analyses must be balanced against the burden such data collections would impose on the Federal contractor community. In order to provide more detailed comments regarding this aspect of the proposal, we urge the OFCCP to include more detailed information about its plans to conduct industry-wide analyses in any future regulatory notices regarding this proposal.

(6) The data collected through the tool may be used to identify contractors in specific industries for industry-focused compensation reviews. What specific categories of data would be most useful for identifying contractors in specific industries for industry focused compensation reviews?

Response:

See our response to question no. 5, as set forth above.

(7) OFCCP is exploring the possibility of using the data collected through the tool to identify opportunities for nationwide multi-establishment compensation reviews.

(a) What specific categories of data would be most useful for conducting compensation analyses across a contractor’s various establishments?

(b) What are the benefits and drawbacks of collecting contractor’s compensation data on a nationwide basis rather than on an individual establishment basis?

(c) What are the benefits and drawbacks of collecting contractor’s compensation data on a nationwide basis in addition to an individual establishment basis?

Response:

For the same reasons a generic “one size fits all” tool will not work, we also believe that analyzing compensation decisions on a nationwide basis will not make sense for most organizations. This is because compensation decisions are often made at a more localized level, with different managers making discrete compensation decisions based on a variety of factors that may be unique to the particular establishment or location. For example, the pay system of some establishments of a Federal contractor may be governed by a collective bargaining agreement while others will not be. Different locations of a single organization may have vastly different operating
budgets, because of geographic location, market conditions or the value of the service being provided by the location to an organization’s overall profitability or business needs. Similarly, two establishments of a single organization may employ workers with vastly different skill sets who perform vastly different jobs.

In addition, we question whether it is appropriate to undertake a nationwide multi-establishment compensation review based solely on results from a preliminary screening tool. Findings of actual compensation discrimination at several establishments within an organization (as opposed to the results of a mere preliminary screening analysis) should be necessary before embarking on such a burdensome enforcement strategy.

(8) The data collection tool may require contractors to submit data on an establishment basis. Given the possible designs of the tool and its proposed uses, OFCCP is interested in learning of any practical concerns contractors may have regarding responding to the compensation data request and how contractors currently record and maintain compensation data. Specifically: (a) What general tasks would be required by a contractor in order to provide the compensation data? (b) What categories of compensation-related data are currently maintained in computer-based personnel or payroll systems? (c) What specific costs and/or benefits would be associated with collecting this type of data?

Response:

As discussed above, one of the biggest practical concerns of our members is how the OFCCP will safeguard the confidentiality of any compensation data that may be submitted. It is absolutely imperative that any compensation data collection proposal issued by the OFCCP address this issue in a meaningful and clear way.

The types of tasks required to respond to any compensation data collection tool will depend entirely on the specific data components requested by the OFCCP. Some information, such as base salary and date of hire, are generally relatively easy to capture and report. More detailed information, such as that proposed by the OFCCP in the ANPRM, is not generally captured by the computer-based personnel or payroll systems of most Federal contractors. Thus, responding to a compensation data collection tool that requires reporting of such detailed data will require extensive, time-consuming data entry or a capital investment in new systems or programs. Investment in a new computer-based system would require funds most organizations do not have at this time. Furthermore, it may take months, if not years, to develop a system that can provide the information in a format compatible with the OFCCP’s requirements. Organizations without the resources for new computerized systems will be forced to commit additional scarce people-hours to manage the data entry tasks. Depending on the specific data requested, we believe that the data-entry hours for a single establishment alone could be in the hundreds of hours.

Both of these options (new systems and/or data entry) place significant hardships on Federal contractors already faced with increasing regulatory burdens in a difficult economy. There will undoubtedly be some businesses who can no longer afford to do business with the Federal government if these additional strains are placed upon them. This not only affects the profitability
and competitiveness of those organizations, but it also affects the ability of the Federal government to get the best product at the best price. Ultimately, these increases in cost will necessarily be passed to the government and other consumers. We urge the agency to take the substantial cost implications to Federal contractors into account when assessing whether another compensation data tool is practical or worthwhile.

(9) OFCCP is considering designing the tool so that it may be used by contractors to conduct self-assessments of their compensation decisions. What specific categories of data would be most useful to contractors interested in using the tool in this manner?

Response:

Our members report that they are highly unlikely to use any compensation data collection tool developed by the agency to conduct any self-analyses of their own compensation practices. Most Federal contractors already have practices and policies in place to conduct meaningful self-assessments of compensation decisions. The methods of analysis vary from contractor to contractor depending on the relevant factors and variables. For this reason, we do not believe that any generic compensation data collection tool developed by the OFCCP would supplant the more specific strategies Federal contractors already have in place for analyzing compensation decisions.

Understanding how the OFCCP will view and analyze compensation data, however, is a vital component of self-audit for most Federal contractors. Since the OFCCP proposed rescinding its 2006 Interpretive Standards for Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Pay Practices (the "Interpretative Standards"), the contracting community has been without any type of guidance from the agency about the processes it is using to analyze the compensation systems of Federal contractors. SHRM and CUPA-HR opposed the agency's rescission of the Interpretative Standards. We urge the OFCCP to focus on developing and sharing information regarding its current compensation review practices before the agency develops a compensation data collection tool. Sharing such data not only promotes government transparency; it also enables Federal contractors to determine whether there are problem areas that require further attention on a proactive basis.

(10) What were the strengths and weaknesses of the compensation section of the 2000 EO Survey?

Response:

One of the most significant weaknesses of the EO Survey was that it aggregated data by EEO-1 category. As discussed above, aggregated compensation data of any kind is simply not useful to the OFCCP's stated purposes. Indeed, the OFCCP's own validation studies of the EO Survey conclusively demonstrated that particular data collection tool was not a valid predictor of discrimination or compliance with the agency's regulatory requirements. In addition, the OFCCP did not have the appropriate resources to adequately analyze the data submitted by Federal contractors in response to the EO Survey. We urge the OFCCP to realistically consider its own
resources and ability to analyze any compensation data collected before it proposes yet another data collection tool.

(11) **OFCCP is considering requiring contractors to submit data electronically. What factors should OFCCP take into consideration when designing this data collection tool? Interested parties should suggest preferred formats - i.e., web-based form (like the EEO-1), excel spreadsheets, etc. What types of databases are currently used, if any, to maintain personnel and payroll data?**

Response:

As discussed above, Federal contractors use a wide variety of tools to maintain personnel and payroll data. Some Federal contractors, particularly those that are small, rely entirely on a manual, paper-based process. Many Federal contractors maintain at least some of their personnel and payroll data in excel format. Others maintain computer-based personnel and payroll systems, which may or may not contain all of the compensation data points that the OFCCP may seek to collect. For these reasons, we recommend that the OFCCP allow Federal contractors to choose from several alternative methods when submitting compensation data to the agency.

Because Federal contractors maintain compensation data in a wide variety of formats, we do not believe that using a web-based system, such as that used for EEO-1 reporting purposes, would be a preferred method for submission. Any electronic submission system developed by the agency also must address the security and privacy concerns associated with submitting highly confidential and proprietary compensation data electronically. Furthermore, the agency should consider that many Federal contractors have firewalls that prohibit or severely restrict the transmission of data over the internet. Similarly, any electronic submission system should be designed to permit secure encryption of data and password protection.

(12) **An option that OFCCP is considering is the possibility of requiring businesses that are bidding on future Federal contracts to submit compensation data as part of the Request for Proposal process. In such a case, the data collected may be used for trend analyses as well as targeting contractors for post-award compliance reviews. What are the benefits and drawbacks of administering the data collection tool in this manner?**

Response:

We do not believe that businesses bidding on future Federal contracts should be required to submit compensation data as part of the Request for Proposal process. Not all businesses that bid on future Federal contracts have existing Federal contracts subject to the OFCCP’s jurisdiction. Accordingly, these businesses -- which may or may not become new Federal contractors -- are unlikely to have systems in place that would allow them to provide compensation data easily. Because many of these businesses are likely to be small businesses, including minority- and women-owned businesses, they may be deterred from bidding on Federal opportunities because they do not understand how any data that might be collected would be used by the Federal government.
Furthermore, we fail to see the utility in collecting compensation data from all bidders on a proposed Federal contract in order to "target[] contractors for post-award compliance reviews". First, the contract award process can be extremely lengthy, meaning that any compensation data collected at the bidding stage likely will be outdated by the time many contracts are actually awarded. Second, requesting data from all contract bidders is an extremely overbroad mechanism for targeting the one business that will be awarded the Federal contract. Third, submission of such data only adds another layer of bureaucracy and cost to an already complex process, which in turn will only serve to increase the costs of Federal procurement activities at a time when our government is focused on reducing government spending.

In order to provide more detailed comments on this topic, we request that any further regulatory notices regarding this aspect of the proposal address the following issues: (1) the implications of submitting such data on businesses with multiple establishments, particularly when work related to the contract will not be performed by all establishments; (2) how the submission of such data would relate to the agency's existing pre-award clearance process for large contracts; (3) whether existing Federal contractors would be required to submit an annual data compensation report to the OFCCP if they bid on a future Federal contract during the same year; and (4) how the OFCCP expects contracting officers to share such data with the agency and the specific steps that would be taken to protect a business' confidential salary information from inappropriate disclosure, given the inevitable wider distribution that would result from this proposal.

(13) Should OFCCP decide to expand the scope of the compensation data collection tool beyond supply and service contractors to include construction contractors, what factors or issues particularly relevant to such contractors should OFCCP keep in mind when designing and implementing the tool?

Response:

Since the OFCCP already has indicated that it is in the process of revising the regulations applicable to construction contractors, we believe the agency should coordinate the development of any compensation data collection tool applicable to construction contractors with that effort. When designing any tool, it is important for the agency to keep in mind that the temporary nature of many construction jobs makes an analysis of compensation data exceedingly difficult. Many construction workers move frequently between multiple constructions jobs on a regular basis, and often work at different rates of pay for each job. The agency also should consider the fact that many Federal construction jobs are subject to collective bargaining agreements, where pay is established through negotiation between organization and union representatives.

(14) Are there other constructive suggestions for the design, content, analysis, and implementation of a compensation data collection tool?

Response:

We urge the OFCCP to thoughtfully consider the implications of imposing yet another regulatory requirement on already-overburdened Federal contractors. In particular, the agency
must evaluate any benefits of a new data collection tool against the overall burdens imposed by the numerous other regulatory requirements it is considering. The OFCCP also should seriously examine the utility of the compensation data it already has available to it for purposes of conducting trend analyses and creating preliminary screening mechanisms. If the OFCCP determines that yet another compensation data tool is required, we encourage the agency to develop a tool that provides Federal contractors with as much flexibility as possible when reporting compensation information. Creating a tool that allows Federal contractors to report compensation data in a format that is most appropriate for each establishment or job is most likely to yield a usable screening tool without unduly burdening the Federal contractor community.

(15) Consistent with the Regulatory Flexibility Act, OFCCP must consider the impact of any proposed rule on small entities, including small businesses, small nonprofit organizations and small governmental jurisdictions with populations under 50,000. In response to this ANPRM, OFCCP encourages small entities to provide data on how they may be impacted by the requirement to provide the compensation data requested by the new data collection tool.

(a) The Department seeks public comment on the types of small entities and any estimates of the numbers of small entities that may be impacted by this rule.

(b) The Department seeks public comment on the potential identifiable costs of the data collection on small entities.

(c) The Department seeks public comment on any possible alternatives to the proposed measures that would allow OFCCP to achieve its objectives while minimizing any likely adverse impact to small businesses such as allowing smaller establishments to submit administrative data - for example, quarterly unemployment insurance tax payments that would include wage information - augmented by gender and race/ethnicity identification, but without other compensation details.

Response:

Our members that are small employers are far less likely to have existing payroll and personnel systems from which they could easily retrieve the type of data likely to be requested by the OFCCP. They also are far more likely to be unable to absorb this additional cost of doing business with the Federal government. For this reason, and because any analysis of such small groupings of employees is unlikely to reveal meaningful disparities in compensation, we strongly urge the OFCCP to consider exempting small businesses from any requirement to report compensation data through a collection tool other than the agency’s existing compliance evaluation process.

CONCLUSION

SHRM and CUPA-HR wholeheartedly support the OFCCP’s primary objective – to root out unlawful compensation discrimination, to the extent it exists. However, we urge the agency to thoughtfully consider whether yet another data compensation tool is necessary, particularly in light
of the compensation information the agency already has available to it through its existing enforcement mechanisms. If the agency decides to move forward with a proposal, coordination with sister enforcement agencies, particularly the EEOC, is absolutely critical to minimizing the burdens associated with a new data collection tool. Finally, any data collection tool must be developed with enough flexibility to account for the myriad factors that may influence compensation decisions by Federal contractors and the varying ways in which Federal contractors currently maintain such data.

We appreciate the opportunity to submit these comments. If we can be of further assistance on this matter, please do not hesitate to contact us.

Respectfully submitted,

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